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CHARLES ELMORE

IN THE

Supreme Court of the United States

OCTOBER TERM, 1932.

Nos. 711 and 721.

BENJAMIN F. JOHNSON,
Petitioner,

against

MANHATTAN RAILWAY COMPANY, *et al.*,
Respondents.

THE AMERICAN BRAKE SHOE AND FOUNDRY COMPANY,
Respondent,

against

INTERBOROUGH RAPID TRANSIT COMPANY,
Respondent.

IN THE MATTER
OF THE
INTERBOROUGH-MANHATTAN RECEIVERSHIP
PROCEEDINGS.

ON WRITS OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SECOND CIRCUIT.

BRIEF ON BEHALF OF RESPONDENTS, the Committees acting for Interborough Rapid Transit Company 7% Secured Notes and 5% Bonds and Guaranty Trust Company of New York, as Trustee under the Interborough Mortgage securing the 5% Bonds.

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ON WRITS OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SECOND CIRCUIT.

BRIEF ON BEHALF OF RESPONDENTS:

(1) The Committee Acting for Interborough Rapid Transit Company Ten-Year Secured Convertible 7% Gold Notes, which became due September 1, 1932;

(2) The Committee Acting for Interborough Rapid Transit Company First and Refunding Mortgage 5% Gold Bonds due January 1, 1966; and

(3) Guaranty Trust Company of New York, as Trustee under Interborough Rapid Transit Company First and Refunding Mortgage dated March 20, 1913, Securing the 5% Gold Bonds.

Opinions Below.

The opinion of the Circuit Court of Appeals is reported in 61 F. (2d) 934 (R. 1024). The opinion of the District Court is reported in 1 F. Supp. 809 (R. 694).

Introductory Statement Identifying the Above Mentioned Committees and Trustee.

The facts are sufficiently set forth in the opinion of the Circuit Court of Appeals, and in briefs filed herein by counsel for the Receivers of Interborough Rapid Transit Company and for The American Brake Shoe and Foundry Company, and will therefore not be repeated in this brief. Certain facts peculiarly pertinent to the status of the above mentioned Committees and Trustee are here referred to.

The above mentioned Committees and Trustee, hereinafter sometimes collectively referred to as the "Creditor Respondents" and separately as the "Committees" and the "Trustee", were appellants in the appeals (R. 738, 759, 779) which were taken from three orders of the District Court of the Southern District of New York to the Circuit Court of Appeals for the Second Circuit. These orders were reversed by the Circuit Court of Appeals (R. 1035). These respondents seek to have affirmed the decree of the Circuit Court of Appeals.

The Committees became parties by intervention (R. 189, 191) to the cause in equity, in which The American Brake Shoe and Foundry Company (hereinafter called "Brake Shoe") is complainant, and the Interborough Rapid Transit Company (hereinafter called "Interborough") is defendant, on September 1, 1932, six days after the appointment of Receivers in that cause and on the date of the maturity of the Ten-Year Secured Convertible 7% Gold Notes of the Interborough outstanding in the principal amount of $31,672,100 and secured by $54,989,000 principal amount of Interborough First and Refunding Mortgage 5% Gold Bonds. The Trustee was made a party to the *Brake Shoe* cause, by order entered

on September 28, 1932 (R. 226) upon the petition of the Interborough Receivers of like date, praying instructions of the Court with respect to the making of certain payments of interest and taxes, and praying that the Trustee be made a party in view of its interest in the funds and property of the Interborough by reason of its being trustee under the said Mortgage.

The First and Refunding Mortgage, dated March 20, 1913, of the Interborough, under which the above mentioned First and Refunding Mortgage 5% Gold Bonds (hereinafter called "5% Gold Bonds") are outstanding, authorized the issue of $300,000,000 principal amount of Bonds (R. 388), in order principally to refund certain obligations and to obtain funds for financing the construction of the Subway lines authorized to be constructed under Contract No. 3, dated March 19, 1913, between the Interborough and The City of New York, and the construction of improvements and extensions to the Elevated lines under the so-called Interborough and Manhattan Certificates, which are also contracts with the City (R. 333).

In 1922 the Interborough issued its Ten-Year Secured Convertible 7% Gold Notes, which matured September 1, 1932, of which there are presently outstanding $31,672,100, secured by $54,989,000 principal amount of the 5% Gold Bonds. There were as of the date of the Interborough Receivers' application No. 9 (R. 329), in addition to the above mentioned $54,989,000 of pledged Bonds, $132,228,000 of 5% Gold Bonds outstanding in the hands of the public, there were in the sinking fund under the First and Refunding Mortgage $40,140,000, there were in the special trust fund of the Trustee for future sinking fund payments $6,556,000, and there were in the Treasury of the Interborough, $1,169,308 of reacquired Bonds, making a total of $235,082,308 principal amount of 5% Gold Bonds (R. 340). Due to sinking fund operations there have been changes in the above amounts which do not, however, greatly alter the picture.

Early in July of 1932, there was formally created under a Deposit Agreement the present Committee for the Ten-Year Secured Convertible 7% Gold Notes (R. 240), and the holders were advised of the approaching maturity of the Notes on September 1, 1932, and of negotiations looking to a plan for the unification of rapid transit railroads and related power properties in the City of New York, and were requested to deposit their Notes. In the latter part of August, and after the appointment of Receivers of the Interborough properties on August 26, 1932, the present Committee for the 5% Gold Bonds was formed under a separate Deposit Agreement, although the personnel of the Committee was and is the same as that of the 7% Note Committee, and deposits were requested in view of the appointment of such Receivers (R. 237). These two Committees are the Committees on whose behalf this brief is submitted.

The Committees for the 7% Notes and 5% Gold Bonds each represent many millions of dollars of deposited Notes and Bonds, respectively, and intervened in the *Brake Shoe* proceedings in the interests of the holders of all of such Notes and Bonds outstanding in the hands of the public (R. 240, 237). Since 1919 various holders of the Interborough Bonds and secured notes have found it necessary to have a committee for the purpose of keeping advised of conditions as they should develop in the City of New York transit situation and of communicating from time to time to the holders of such securities information concerning the properties which are now in receivership in this case. The present Committees are composed of officers or representatives of the holders of such securities or of individuals acting as their successors due to death or resignation.

These Creditor Respondents concur in the statement of facts and arguments set out in the briefs filed on behalf of Interborough Receivers and the Brake Shoe Company. For

this reason only certain arguments peculiarly pertinent to these Creditor Respondents are considered in detail herein.

Summary of Argument.

The rights given under the Federal Statutes and Federal Equity Rules to these Creditor Respondents who intervened in or were by order made a party to the *Brake Shoe* cause subsequent to the filing of the complaint cannot be impaired by rules of mere convenience.

For a more complete statement of the argument reference is made to the Index.

I.

The status of the *Brake Shoe* cause at the time of the intervention of the Committees and the entry of the order making the Trustee a party.

Not only is there no question at issue in this proceeding as to the necessity of the intervention of this Equity Court for the protection of creditors but all parties to these appeals admit the existence of such necessity. Likewise it is admitted that the necessary jurisdictional facts are present in the *Brake Shoe* cause. Aside from the Petitioners' belated emphasis on a charge of collusion, it is undisputed by the parties to these appeals, by the District Judge and by the Circuit Court of Appeals, that the Equity side of the District Court for the Southern District of New York, in the Second Judicial Circuit, had from the time of its institution and now has complete and full jurisdiction over the subject matter and the parties to the *Brake Shoe* cause.

The fact that the Interborough at the time of the filing of the *Brake Shoe* complaint had falling due on September 1, 1932, nearly $32,000,000 of 7% Notes and on October 1, 1932, $10,500,000 of 6% Notes, and in addition had other

debts due and owing, including substantial amounts due in respect to taxes for 1928 and 1929 duly assessed by the City of New York, and was without funds to meet these and its other obligations, clearly indicated the necessity for the intervention of the District Court (R. 161, 165). Furthermore, by reason of this financial crisis the public interest required the intervention of a Court of Equity to protect property values in excess of $600,000,000, the interests of upwards of 18,000 employees of the Interborough, the millions of passengers using daily these transportation facilities, the many thousands of holders of securities issued to obtain the funds to construct these vast transportation facilities, and in fact the interests of the hundreds of thousands of taxpayers of the City of New York by reason of the millions of dollars invested by the City in these properties.

The plaintiff in the *Brake Shoe* cause brought a suit of a civil nature in equity in which the matter in dispute exceeds the jurisdictional amount and the suit is between citizens of different states (R. 153, 169). The plaintiff in this cause sued on its own behalf and on behalf of all other creditors of the Interborough who might thereafter join in the prosecution of the suit. The Committees intervened in such cause (R. 189, 191). The Trustee was made a party thereto by order of the District Court (R. 226). The status of these Creditor Respondents is, therefore, that of large creditors who seek the protection of an Equity Court, and who have joined in the prayer of the complaint in such cause and have asked that their rights and the rights of all creditors be ascertained and decreed; that that Equity Court shall fully administer the fund in which they are interested, constituting the railways and other assets of the defendant, the Interborough, and that that Equity Court will for such purpose marshal and administer all of the assets of the defendant and ascertain the several and respective liens and priorities existing thereon and enforce by decree the rights, liens and equities of the creditors of

the defendant as the same may be finally ascertained and decreed; that pending such marshalling and administration and final decrees, for the purpose of preserving intact the property and assets of the defendant, a receiver or receivers be appointed with all the incidental powers ordinarily vested in receivers in like cases and with full power and authority to operate the railroad properties and assets of the defendant; and that pending the suit an injunction issue against the defendant and all persons, restraining them from interfering with said receiver or receivers taking possession of said property, and for such other and further relief in the premises as the nature of the case might require and as might be agreeable to equity (R. 167-169).

The prayer of the creditors of the Interborough was that a subpoena issue out of this Court directing the defendant to appear (R. 169). The defendant appeared and joined in the prayer of the complaint in this cause and asked the Equity Court to take possession of its property through the appointment of a receiver or receivers and thereby protect and preserve its property and manage, operate and control the same, and consented to the granting of the other general relief prayed for in the complaint (R. 171-173).

The principal events that have taken place in this cause are set forth in the full statement of the facts which is to be found in the brief of the Interborough Receivers. It is submitted, first, that the proceedings customarily taken in suits of this character did take place for the protection of creditors for the period of time from August 26, 1932, up to October 18, 1932, the date of the orders which were the subject of the appeals to the Circuit Court, and, second, that such proceedings and the respective orders entered subsequently in the District Court are of such a character as to provide substantial protection for the rights of all creditors.

The Trustee was made a party by court order and the Committees in intervening in the Brake Shoe cause took the only course available to protect the vast interests which they represent.

II.

Creditor Respondents and the Respondent Trustee having acted in good faith are entitled not only to the protection of the court of equity but are also entitled to have that court exercise its power so as not to cause injury to them.

It is the cardinal rule of courts of equity to prevent persons who have acted in good faith upon the exercise of power by the equity court, while it was in possession of apparent jurisdiction, from suffering injury. *Electrical Supply Co.* v. *Put-In-Bay Waterworks, Light & Railway Company,* 84 Fed. 740 (C. C. N. D. Ohio, 1898). The grounds upon which this doctrine rests are first, the necessity which the court is under to defend its possession, and hold the property subject to its order; and, second, the obligation it thereby assumes to itself to undertake the affording of redress to those whom it prevents, by withholding the property, from obtaining relief elsewhere. This Court has repeatedly indicated that where the equity courts have been administering property of creditors under color of authority, so that the rights of innocent parties have become involved, this Court will affirm their acts so far as necessary to protect the rights of such parties as have relied on a continuation of their authority. *Harkin* v. *Brundage,* 276 U. S. 36, 57 (1928).

It is respectfully submitted that these Creditor Respondents, as well as all other creditors, are entitled to have their rights and the rights of the defendant, in whose property they have such a substantial interest, protected in the cause to which they are parties, namely, the *Brake Shoe* cause. They are entitled to the general relief granted them by the law and the rules of this Court which give to them protection against a multiplicity of suits and the right to have enjoined attempts to interfere with their property rights in other suits or proceedings.

It is respectfully urged by these Creditor Respondents that in view of these proceedings, this Equity Court is bound to

exercise its equity powers to protect and preserve the integrity of the action which has been taken in the *Brake Shoe* cause and to protect the continued exercise of the equity powers of this Court therein. The paramount rights of these Creditor Respondents compel the preservation of the integrity of the proceedings in the *Brake Shoe* cause.

III.

The rights of the Creditor Respondents and the Respondent Trustee under the Judicial Code and Federal Equity Rules and the effect in this proceeding of Rules 1-a and 11-a.

It is submitted that the Senior Circuit Judge was duly empowered to hold a District Court with all the rights, powers and duties of a District Judge.

That the Senior Circuit Judge of the Second Circuit had the power, under Sections 18 and 19 of the Judicial Code (28 USCA §§ 22 and 23) to designate himself as a Judge to hold a District Court in the Southern District of New York in the Second Circuit if the public interest so required is unquestioned. That the Senior Circuit Judge, having been designated to hold a District Court, became a *de jure* Judge with all of the rights, powers and duties of a District Judge is, we believe, clear, but we refer to the brief of the Interborough Receivers for a detailed and conclusive statement in this connection. Such Judge so designated himself following a practice of long standing. Congress's failure in 1922 substantially to amend this section in this respect, forcefully suggests its approval of this practice which had previously been followed, not only in the Second Circuit but in practically every Circuit in the United States. There can be no question of the validity of the designation under the first general order. Likewise we believe that the designation order of August 25, 1932, was a valid order and that the Judge's opinion as to the existence of "public necessity" must be final.

Creditor Respondents were entitled to act upon their knowledge that in consequence of designation, the Senior Circuit Judge was holding a District Court for the Southern District of New York *de jure* and not *de facto*, and that by the express terms of Section 18 of the Judicial Code he had "all the powers and rights, * * * of a Judge of the District", and under Section 19 that it was his "duty * * * to discharge all the judicial duties" for which he was appointed.

There being, in our opinion, no question but that the Senior Circuit Judge was a Judge *de jure*, the precise questions involved in these appeals (which these Creditor Respondents will not attempt to argue in detail) are

> (a) whether or not agreements or, as asserted, "rules" requiring litigants to make applications for a Receiver in equity to an assigned Judge sitting in the Motion Part of a Federal District Court are at all binding upon a Circuit Judge designated to hold a District Court in the District; and if so, whether they should be regarded as mere rules of convenience having the force of directing the method in which the business in the District Court will be conducted, or whether they should be regarded as having greater force and as being jurisdictional in nature, and
>
> (b) whether there can be an attack by independent bill if they are not jurisdictional.

Rule 1-a of the Federal District Judges attempts to limit a designated Judge to handling only such work as shall be assigned him by a Senior District Judge. The District Judge's opinion clearly indicates that Rule 11-a includes designated Circuit Court Judges. Therefore, we have the question whether Rule 11-a, as well as Rule 1-a, are in conflict with Sections 9 and 18 of the Judicial Code (28 USCA §§ 13 and 22) and Federal Equity Rules 1 and 6. If 11-a were intended merely to cover District Judges there would still be the question, though not involved in this case, of whether that rule is not only inconsistent with Section 9 but

also inconsistent with Sections 13 and 14 of the Judicial Code (28 USCA §§ 17 and 18).

It is submitted that the decision of the Circuit Court of Appeals is sound and conclusive in holding that the rules in question are not jurisdictional and that accordingly no collateral attack may be made upon action by a judge alleged to be in contravention of such rules.

(a) *Rules 1-a and 11-a* cannot have the binding force of statutes because they are inconsistent with Section 9 of the Judicial Code and Federal Equity Rules Nos. 1 and 6.*

(1) *Rules 1-a and 11-a are inconsistent with Section 9 of the Judicial Code and Federal Equity Rules Nos. 1 and 6.*

Section 9 of the Judicial Code (28 USCA § 13) is as follows:

> "Sec. 9. *Courts open as courts of admiralty and equity.* The district courts, as courts of admiralty and as courts of equity, shall be deemed always open for the purpose of filing any pleading, of issuing and returning mesne and final process, and of making and directing all interlocutory motions, orders, rules, and other proceedings preparatory to the hearing, upon their merits, of all causes pending therein. *Any district judge* may, upon reasonable notice to the parties, make, direct, and award, at chambers or in the clerk's office, and in vacation as well as in term, all such process, commissions, orders, rules, and other proceedings, whenever the same are not grantable of course, according to the rules and practice of the court." (Italics ours.)

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* *1-a.* Any judge designated to sit in the District Court for the Southern District of New York, shall do such work only as may be assigned to him by the senior district judge.

11-a. All applications for the appointment of receivers in equity causes, in bankruptcy causes and any other causes (except where a receiver in bankruptcy may be appointed by a referee as provided in the Bankruptcy Rules), shall be made to the judge assigned to hold the Bankruptcy and Motion Part of the business of the court and to no other judge.

The parties to the *Brake Shoe* cause, including the respondent intervenors, thus had the right to have the authority of the District Court exercised at all times by the District Judges of this District, and they had the right to have any District Judge, whether appointed or designated, at Chambers or at any place or time, make for their benefit all orders necessary to carry out the powers which they under the law were entitled to have exercised for their benefit. Otherwise, litigants having a valid cause at issue which entitles them to the relief resulting from the appointment of receivers in protection of their property interest would be subjected to great hazard in the event the District Judge holding the motion term was inaccessible, without the district, disqualified or for any other reason inaccessible to the litigants, and of losing their constitutional right to the relief afforded to them by the statutes and by the Federal Equity Rules.

Of course, the powers provided for in Section 9 of the Judicial Code must be exercised in accordance with the rule-making power of the Supreme Court of the United States as authorized by Congress (28 USCA § 730). This power is generally to regulate the whole practice to be used in suits in equity by the District Courts. Pursuant thereto there have been promulgated by the Supreme Court the rules of practice for the courts of equity of the United States. Federal Equity Rule 1 practically quotes Section 9 and is to the effect that

> "Any District Judge may * * * make * * * at chambers * * * all such * * * orders * * *."*

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*RULE 1.

District Court Always Open for Certain Purposes—Orders at Chambers.

The district courts, as courts of equity, shall be deemed always open for the purpose of filing any pleading, of issuing and returning *mesne* and final process, and of making and directing all interlocutory motions, orders, rules and other proceedings preparatory to the hearing, upon their merits, of all causes pending therein.

Any district judge may, upon reasonable notice to the parties, make, direct, and award, at chambers or in the clerk's office, and in vacation as well as in term, all such process, commissions, orders, rules and other proceedings, whenever the same are not grantable of course, according to the rules and practice of the court.

Equity Rule 6 specifically provides

> "Each district court shall establish regular times and places * * * when motions requiring notice and hearing may be made and disposed of; but the judge may at any time and place * * * make and direct all interlocutory orders, rulings and proceedings for the advancement, conduct and hearing of causes * * *."*

To hold that Rules 1-a and 11-a could have the force of nullifying the provisions of Section 9 and of Equity Rules 1 and 6 would be to give greater effect to such rules than they can have. That would, in effect, nullify the provisions of the statute and the rules promulgated by this Court pursuant to the authority granted it by Congress.

> (2) *The Federal District Court for the Southern District of New York does not have the power to make rules of the character of 1-a and 11-a which would be jurisdictional and have the force of statutes.*

It has been held by this Court that no practice of the lower courts, inconsistent with its rules, can be admissible to control them.

> *The Bank of the United States* v. *Jacob White, et al.*, 33 U. S. 262 (1834).

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* RULE 6.

Motion Day.

Each district court shall establish regular times and places, not less than once each month, when motions requiring notice and hearing may be made and disposed of; but the judge may at any time and place, and on such notice, if any, as he may consider reasonable, make and direct all interlocutory orders, rulings and proceedings for the advancement, conduct and hearing of causes. If the public interest permits, the senior circuit judge of the circuit may dispense with the motion day during not to exceed two months in the year in any district.

This Court, referring to the jurisdiction of a court, announced,—

> "But no rule of court can enlarge or restrict jurisdiction. Nor can a rule abrogate or modify the substantive law. * * * It is true of rules of practice prescribed by this Court for inferior tribunals, as it is of those rules which lower courts make for their own guidance under authority conferred."
>
> *Washington-Southern Co.* v. *Baltimore Co.*, 263 U. S. 629, 635 (1923).

It would seem that, *a priori*, no rule of court can in the absence of specific legislative authority enlarge or restrict the jurisdiction of a judge of such a court.

While we contend that rules 1-a and 11-a were not even rules for division of business, this question has been dealt with by several State Courts, and it has been held that rules or agreements for the division of business are not jurisdictional in nature.

In *Foley* v. *Utterback*, 196 Iowa 956, 195 N. W. 721 (1923), the Supreme Court of Iowa said (at p. 722):

> "The district court is a court of general jurisdiction, and the mere division of judicial duties by agreement of the judges does not in itself deny judicial functions to any judge of that court."

In *State* v. *Lichtenberg*, 4 Wash. 553, 30 Pac. 659 (1892), the Supreme Court of Washington used the following language (at p. 660):

> "The rules of said court in partitioning the business between the respective judges thereof should be upheld, as far as possible, in order to facilitate the orderly and convenient discharge of the business, and we have no doubt of the court's authority to classify and partition it as was done. However, there can be no question, notwithstanding this, but that each judge has all the power

> that any other judge of said court has to try any cause within the jurisdiction of said court, regardless of said apportionment."

In *White* v. *Superior Court of City and County of San Francisco*, 110 Cal. 60, 42 Pac. 480 (Cal. 1895), it was held that (at p. 482):

> "• • • whether sitting separately or together, the judges hold but one and the same court, and the jurisdiction they exercise in any cause is that of the court, and not the individual. The division into departments is purely imaginary, and for the conveniences of business and of designation. Transferring a cause for trial or disposition from one of those departments to another does not effect a change or transfer of the jurisdiction of that cause; that remains at all times in the court as a single entity."

To the same effect see also *People* v. *Barbera*, 78 Cal. App. 277, 248 Pac. 304 (Dist. Ct. App. Cal. 1926).

(b) If Rules 1-a and 11-a are to be considered jurisdictional as rules of practice, they have not been approved as required by Equity Rule 79. Rules 1-a and 11-a are not rules of practice.

If the agreements represented by Rule 1-a and 11-a are rules of practice adopted pursuant to Section 731 of the United States Code they have not been validly adopted, for they have not been approved, as required by Equity Rule 79, by a majority of the Judges of the Circuit Court of Appeals for the Second Judicial Circuit, notwithstanding the fact that the Rules, including those dealing with practice, to which they have been added as subdivisions, have been so submitted and approved. We, however, agree with petitioner Johnson's Brief (p. 45) that these are not rules of practice. They are mere rules made under Section 731 for conveniently handling the business of the court.

(c) *Rules 1-a and 11-a are not rules for the division of business, covered by Section 23 of the Judicial Code* (28 USCA § 27).

Petitioners have sought to claim the authority for the making of Rules 1-a and 11-a to be Section 23 of the Judicial Code as well as Section 731 of the United States Code. It is submitted that it is clear that the rules in question are not rules for the division of business. The District Judge apparently appreciating that the "division of business" referred to in Section 23 of the Judicial Code related only to temporary or periodic agreements between District Judges, supported the action of the District Court in promulgating Rules 1-a and 11-a solely on Section 731 of the United States Code. We think it clear that the District Judge was sound in this respect that the power to make rules of this character flowed from Section 731, but as to the scope of the rules and their effect we, of course, agree with the Circuit Court of Appeals and disagree with the District Judge who, while trying to minimize the seriousness of the rules, presumably in order to indicate that they were not of sufficient importance to require the concurrence of a majority of the Circuit Judges, yet held that they were jurisdictional and had the effect of making the Senior Circuit Judge a stranger and an interloper.

(d) *Rules 1-a and 11-a are not jurisdictional.*

In viewing the substantial rights of creditors one is bound to conclude that such agreements (Rules 1-a and 11-a) (or even such agreements as have technically become "rules") should not have such force in a court of equity as absolutely to control in an inelastic manner the action of the Chancellor, who has power to deal with complicated situations such as those presented by the subject matter of these appeals. It is only reasonable that the Chancellor should be at liberty to depart from the terms of rules of the character in question if in his judgment it is necessary to do so in order to serve the ends of justice. Obviously, orderly procedure requires faith-

ful adherence and the utmost respect for such rules as are here under consideration and particularly where they represent the unanimous agreement of the learned resident Judges of the District Court. But it is respectfully submitted by these Creditor Respondents that they can not reasonably be interpreted as jurisdictional in effect, and that this Court is bound to hold that such rules are merely directory and not jurisdictional. *Southern Pacific Co.* v. *Johnson*, 69 Fed. 559 (C. C. A. 9th, 1895); *Southern Pacific Co.* v. *Hamilton*, 54 Fed. 468 (C. C. A. 9th, 1893); *Matter of Benedict*, 239 N. Y. 440 (1925); *Cole, et al.*, v. *Gourlay, et al.*, 79 N. Y. 527 (1880).

IV.

Rules 1-a and 11-a being directory, they could not be collaterally attacked. The consolidation order could not make the parties in the *Brake Shoe* cause parties to the *Johnson* cause in order to cure the defect due to the collateral attack in this case.

If Rules 1-a and 11-a are, as we have contended and as the Circuit Court of Appeals has held, merely directory, there could be no attack on the validity of the designation orders or the other orders made by the designated Circuit Judge in another action, and no authority was vested in the District Court to vacate in the *Johnson* cause orders entered in the *Brake Shoe* cause.

In re Manning, 139 U. S. 504 (1891);
Ball v. *U. S.*, 140 U. S. 118 (1891);
Commercial Union of America v. *Anglo-South American Bank*, 10 Fed. (2d), 937, C. C. A. 2d, (1925) and
Hardy v. *North Butte Mining Co.*, 22 Fed. 2d, 62, C. C. A. 9th, (1927).

Although the District Court held in the *Johnson* cause that the bringing of that cause was a proper means of attacking the orders of the Senior Circuit Judge, yet it indicated that it had some doubt as to its power to make orders in the *Johnson* cause effective against the parties in the *Brake Shoe* cause even though it held that Rules 1-a and 11-a were jurisdictional and further held that the orders entered in the *Brake Shoe* cause were void. It therefore entered on its own motion the so-called consolidation order. The intention probably was that by making such order in the *Johnson* cause, the consolidation of the *Brake Shoe* cause with the *Johnson* cause in such a manner would give jurisdiction over the parties in the *Brake Shoe* cause.

It is clear, we submit, that a consolidation order cannot have the effect apparently intended for it by the District Judge. This is admitted in petitioner Johnson's brief at page 70, where it is stated that "no intervention was created by the 'Consolidation Order', but each of the two causes consolidated by the order retained its full force and virtue as an independent cause."

A consolidation of equity causes is primarily but an expedient adopted for saving costs and delay. Consolidation operates as a mere carrying on together of two separate suits supposed to involve identical issues, and is intended to expedite the hearing and diminish the expense. *Brevard* v. *Summar*, 2 Heisk. 97-105; *Toledo, St. L. & K. C. R. Co., et al.* v. *Continental Trust Company, et al.*, 95 Fed. 497 (C. C. A. 6th, 1899). It is respectfully submitted that the issues in the *Brake Shoe* cause and in the *Johnson* cause do not involve identical issues and are of different character so that consolidation was not even proper. There can be no doubt that the District Judge by directing the consolidation does not thereby obtain power to make the two independent causes a single cause. The two separate constituent causes remain as independent after the order of consolidation as before. *Adler* v. *Seaman, et al.*, 266 Fed. 828 (C. C. A. 8th, 1920), cer. den., 254 U. S. 655.

CONCLUSION.

It is submitted that the decision of the Circuit Court of Appeals is sound and conclusive in holding that the rules in question have merely the force of directing the method in which the business in the District Court should be conducted and, not being jurisdictional, accordingly no collateral attack may be made upon a judge's action alleged to be in contravention of such rules.

V.

The decree of the Circuit Court of Appeals should be affirmed.

Dated, New York, N. Y., April 15, 1933.

Respectfully submitted,

JOHN W. DAVIS,
Counsel for Respondents,

(1) The Committee Acting for Interborough Rapid Transit Company Ten-Year Secured Convertible 7% Gold Notes, which became due September 1, 1932;

(2) The Committee Acting for Interborough Rapid Transit Company First and Refunding Mortgage 5% Gold Bonds due January 1, 1966; and

(3) Guaranty Trust Company of New York, as Trustee under Interborough Rapid Transit Company First and Refunding Mortgage dated March 20, 1913, Securing the 5% Gold Bonds.

EDWIN S. S. SUNDERLAND,
Of Counsel.